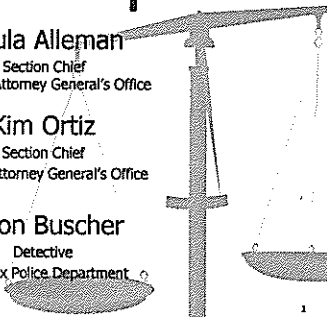


Wiretaps

Paula Alleman
Section Chief
Arizona Attorney General's Office

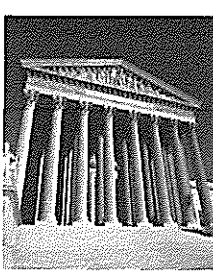
Kim Ortiz
Section Chief
Arizona Attorney General's Office

Jason Buscher
Detective
Phoenix Police Department

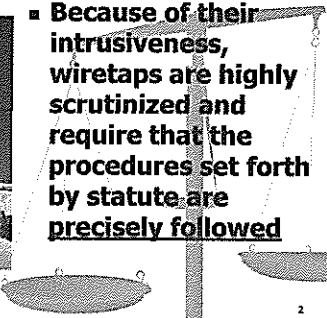


1

WIRETAPS



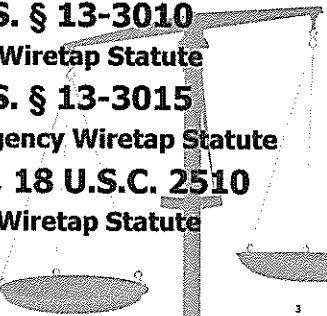
- Because of their intrusiveness, wiretaps are highly scrutinized and require that the procedures set forth by statute are precisely followed



2

WIRETAP STATUTES

- A.R.S. § 13-3010
Arizona Wiretap Statute
- A.R.S. § 13-3015
Arizona Emergency Wiretap Statute
- Title III, 18 U.S.C. 2510
Federal Wiretap Statute

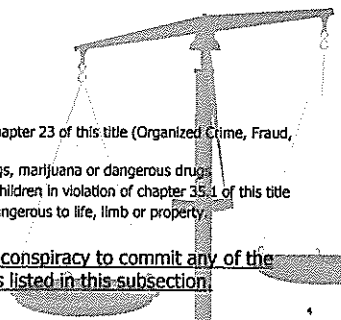


3

For the purposes of A.R.S. § 13-3010, "crime" means:

- Murder
- Gaming
- Kidnapping
- Robbery
- Bribery
- Extortion
- Theft
- An act in violation of chapter 23 of this title (Organized Crime, Fraud, and Terrorism)
- Dealing in narcotic drugs, marijuana or dangerous drugs
- Sexual exploitation of children in violation of chapter 35.1 of this title
- Or any felony that is dangerous to life, limb or property

Crime includes conspiracy to commit any of the offenses listed in this subsection.

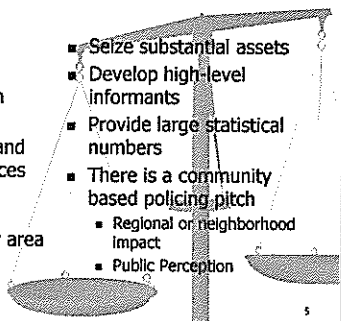


4

Wiretap Benefits

Wiretaps Can:

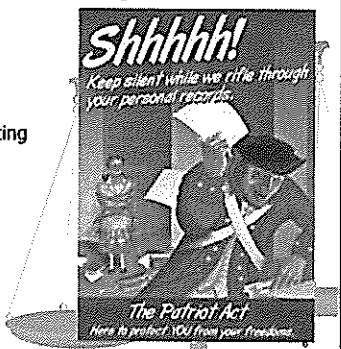
- Dismantle/disrupt organizations
- Provide longer prison terms
- Provide intelligence and education into practices and organizational structure of criminal organizations in your area
- Seize substantial assets
- Develop high-level informants
- Provide large statistical numbers
- There is a community based policing pitch
 - Regional or neighborhood impact
 - Public Perception



5

Wiretap Investigations

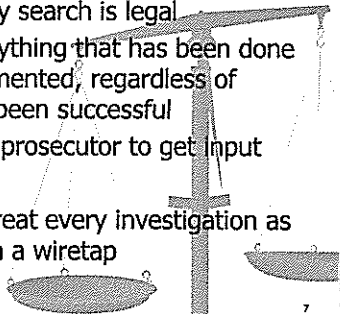
- Complex
- Take Time
- Require Lengthy Writing
- Exhaust Resources
- Cost Money
- Require Flexibility



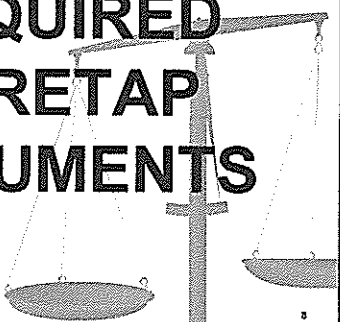
6

Pre-Wire Investigation

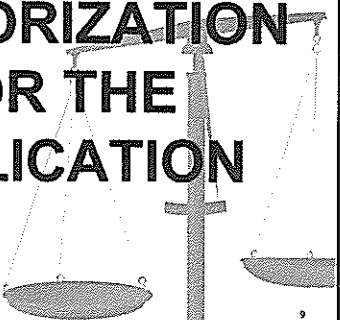
- Make sure every search is legal
- Make sure everything that has been done has been documented, regardless of whether it has been successful
- Meet with your prosecutor to get input
- Take away — treat every investigation as if it will result in a wiretap



REQUIRED WIRETAP DOCUMENTS



AUTHORIZATION FOR THE APPLICATION



**A.R.S. §13-3010: If Not the Elected Official,
Attorney Must Be Designated In Writing**

- A. On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications....



10

State v. Verdugo

180 Ariz. 180 (App. 1993)

- Facts: Defendant was one of 31 people charged in 81 drug related counts. He was charged with 5 counts. Based on interpreted calls, defendant, while an inmate in DOC telephoned his brother in Phoenix to arrange for the delivery of drugs to the prison in Douglas.
- Defendant first argued that the AZ delegation statute was unconstitutionally broader than the federal statute because the federal statute does not include delegation language. Court relied on *Commonwealth v. Vitello*, 367 Mass. 224 (1975) to find that AZ's statute substantially complies with the federal statute and is therefore constitutional.



11

State v. Verdugo (cont.)
180 Ariz. 180 (App. 1993)

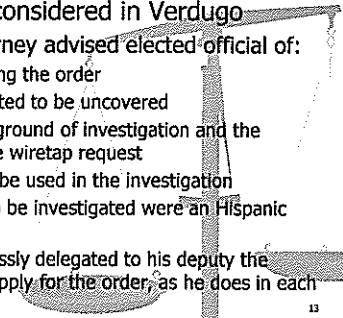
- Defendant also argues Authorization was inadequate.
- In *Vitello*, the court set out guidelines for implementation of its statute. It required:
 - Special designation be on a case-by-case basis only
 - Principle prosecuting attorney fully and fairly review the grounds asserted as warranting an order
 - The authority to apply be in writing



12

State v. Verdugo (cont.)
180 Ariz. 180 (App. 1993)

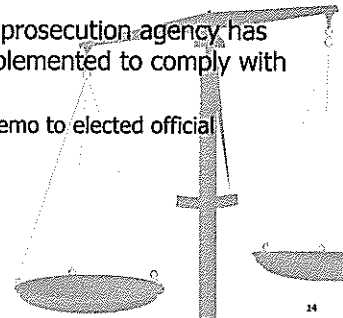
- Factors court considered in Verdugo
 - Assigned attorney advised elected official of:
 - Agency seeking the order
 - Crimes expected to be uncovered
 - General background of investigation and the reason for the wiretap request
 - Resources to be used in the investigation
 - The people to be investigated were an Hispanic family
 - The CA expressly delegated to his deputy the authority to apply for the order, as he does in each case



13

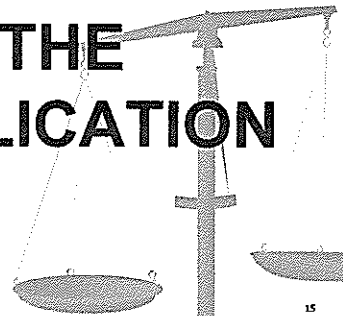
State v. Verdugo
Take Away

- Make sure the prosecution agency has procedures implemented to comply with Verdugo
 - AGO uses a memo to elected official



14

THE
APPLICATION



15

State v. Salazar, 231 Ariz. 535, 537
(App. Div. 1, 2013)

Facts: "The application consisted simply of a one-paragraph summary request for wiretap signed by the deputy county attorney. The application attached the affidavit of a deputy sheriff. In her application, the deputy county attorney did nothing more than provide her name, identify her authority to make the application, and ask that the court authorize a wiretap for the reasons stated in the affidavit of the deputy sheriff." ¶18

16

State v. Salazar, 231 Ariz. 535
(App. Div. 1, 2013)

Under A.R.S. § 13-3010(B)(2), the applicant must provide a "full and complete statement of the facts and circumstances relied upon *by the applicant*,"* including the supporting oath or affirmation of the investigating peace officer of this state or any political subdivision of this state to justify the officer's belief that an order should be issued."

*** EMPHASIS IN ORIGINAL**

17

State v. Salazar, 231 Ariz. 535
(App. Div. 1, 2013)

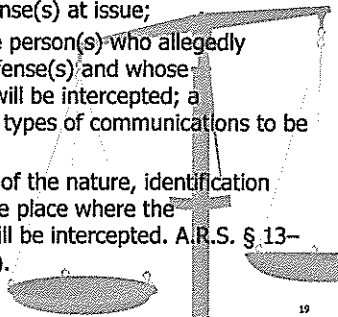
Under A.R.S. § 13-3010(B)(2), the applicant must provide a "full and complete statement of the facts and circumstances relied upon *by the applicant*,"* including the supporting oath or affirmation of the investigating peace officer of this state or any political subdivision of this state to justify the officer's belief that an order should be issued."

*** EMPHASIS IN ORIGINAL**

18

State v. Salazar:
Applicant's Statement Must Include

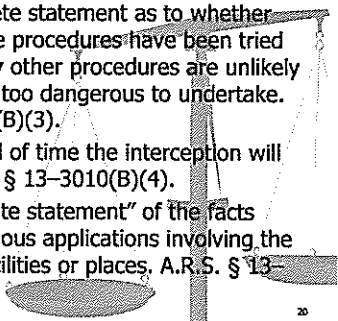
- details of the offense(s) at issue;
- the identity of the person(s) who allegedly committed the offense(s) and whose communications will be intercepted; a description of the types of communications to be intercepted;
- and a description of the nature, identification and location of the place where the communication will be intercepted. A.R.S. § 13-3010(B)(2)(a)-(d).



19

State v. Salazar:
The Applicant Must Also Provide:

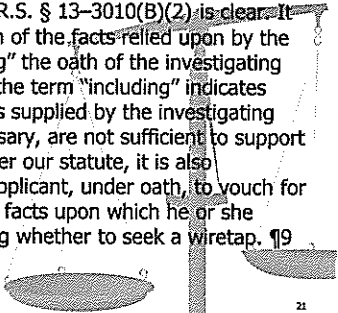
- a "full and complete statement as to whether other investigative procedures have been tried and failed" or why other procedures are unlikely to succeed or are too dangerous to undertake. A.R.S. § 13-3010(B)(3).
- identify the period of time the interception will take place. A.R.S. § 13-3010(B)(4).
- "a full and complete statement" of the facts regarding all previous applications involving the same persons, facilities or places. A.R.S. § 13-3010(B)(5).



20

State v. Salazar, 231 Ariz. 535, 537
Case Holding

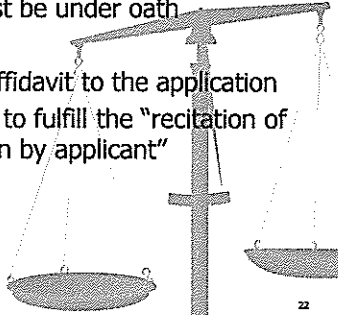
The language of A.R.S. § 13-3010(B)(2) is clear. It requires a recitation of the facts relied upon by the applicant, "including" the oath of the investigating officer. The use of the term "including" indicates that the sworn facts supplied by the investigating officer, while necessary, are not sufficient to support an application. Under our statute, it is also necessary for the applicant, under oath, to vouch for the complete set of facts upon which he or she relied in determining whether to seek a wiretap. ¶9



21

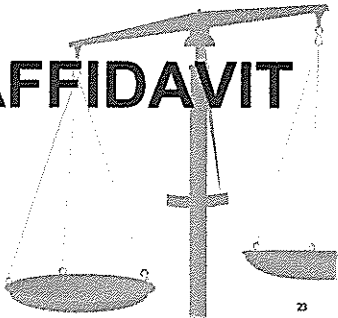
Salazar's Two Takeaways

- Application must be under oath
- Attaching the affidavit to the application is not sufficient to fulfill the "recitation of facts relied upon by applicant"



22

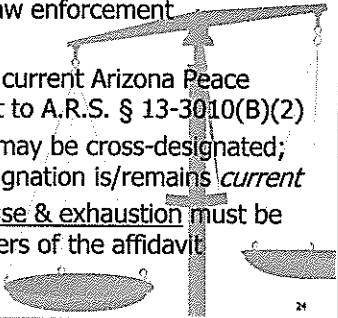
THE AFFIDAVIT



23

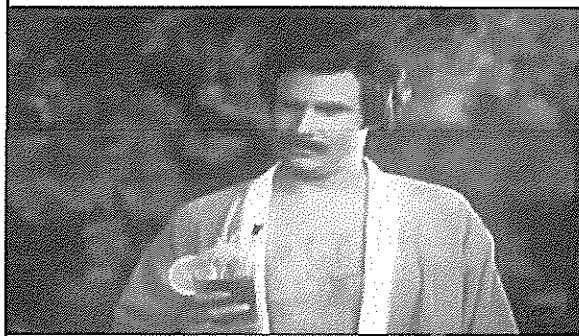
THE AFFIDAVIT

- Completed by law enforcement
 - the Affiant(s)
- Affiant must be current Arizona Peace Officer pursuant to A.R.S. § 13-3010(B)(2)
- Federal agents may be cross-designated; make cross-designation is/remains *current*
- All probable cause & exhaustion must be in the four corners of the affidavit



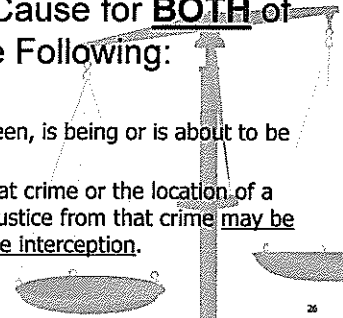
24

The Affiant



A.R.S. § 13-3010 (A)(1) & (A)(2)
The Affidavit Has to Established Probable Cause for **BOTH of the Following:**

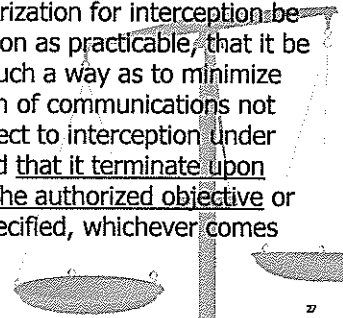
- A crime has been, is being or is about to be committed.
- Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception.



Goals

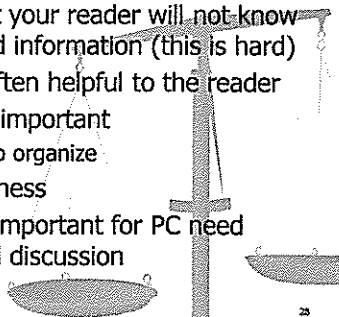
A.R.S. § 13-3010(D)(6)

- That the authorization for interception be executed as soon as practicable, that it be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this section and that it terminate upon attainment of the authorized objective or on the date specified, whichever comes first.



Narrative Section

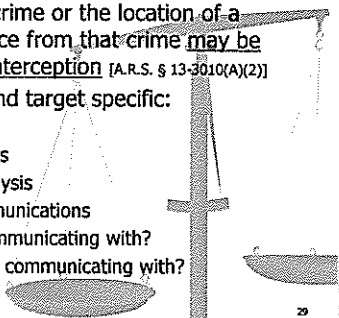
- Remember that your reader will not know any background information (this is hard)
- Headings are often helpful to the reader
- Organization is important
 - Various ways to organize
- Watch for staleness
- Items that are important for PC need more detail and discussion



28

Telephone Analysis

- Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception [A.R.S. § 13-3010(A)(2)]
- Analysis is case and target specific:
 - Pattern Analysis
 - Frequency Analysis
 - Common Call Analysis
 - Intercepted Communications
 - Who is Target communicating with?
 - Who is Target not communicating with?

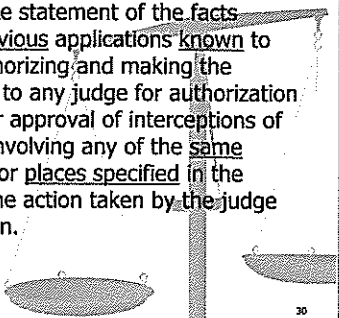


29

Prior Applications

A.R.S. § 13-3010(B)(5)

- A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application.

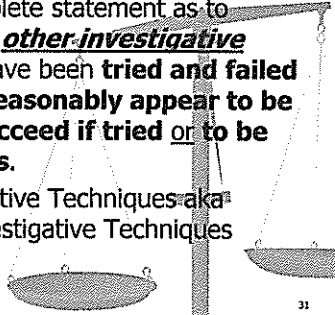


30

Necessity / Exhaustion

A.R.S. § 13-3010(B)(3)

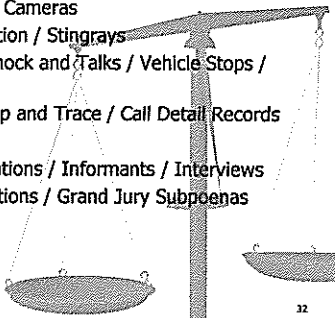
- A full and complete statement as to whether or not ***other investigative procedures*** have been **tried and failed** or **why they reasonably appear to be unlikely to succeed if tried** or **to be too dangerous.**
- Other Investigative Techniques aka Traditional Investigative Techniques



31

Traditional Investigative Techniques

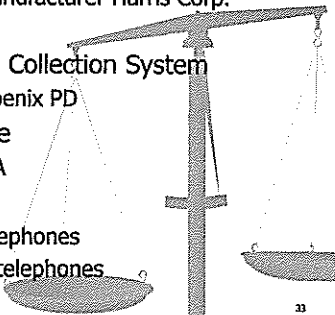
- Surveillance / Covert Cameras
- GPS / Precision Location / Stingrays
- Search Warrants / Knock and Talks / Vehicle Stops / Consent Searches
- Pen Register and Trap and Trace / Call Detail Records
- Trash Runs
- Undercover Investigations / Informants / Interviews
- Grand Jury Investigations / Grand Jury Subpoenas



32

Stingray

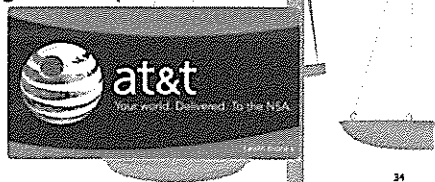
- Stingray
 - Name given by manufacturer Harris Corp.
 - Copyright
- Signal Information Collection System
 - Name used by Phoenix PD
- Over the Air Device
 - Name used by DEA
- Two Uses
 - Located known telephones
 - Identify unknown telephones



33

Pen Register / Trap and Trace

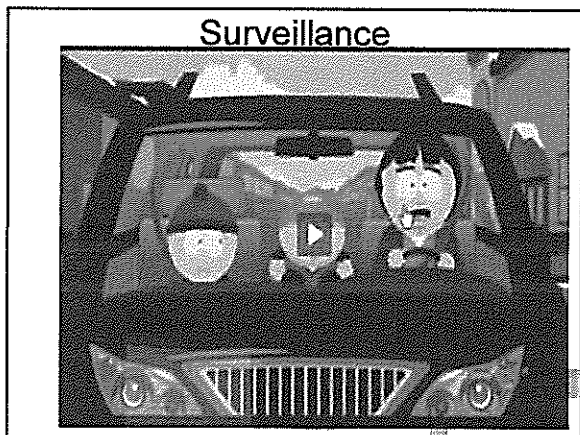
- **Pen Register:** records OUTBOUND digits from a targeted telephone.
- **Trap and Trace:** records INBOUND digits to a targeted telephone.



34



35



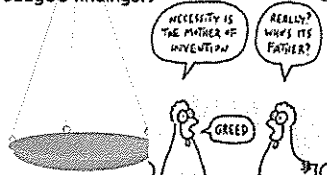
EXHAUSTION EXPLAINED

- Interception of communications need not be used **ONLY** as a last resort. The purpose of the requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the judge of the difficulties involved in the use of conventional techniques. The showing must be tested in a practical and commonsense fashion.
- Courts have acknowledged that wiretapping is particularly appropriate when the investigation shows that the telephone is routinely relied on by the criminal enterprise members to conduct the enterprise's illegal activities

37

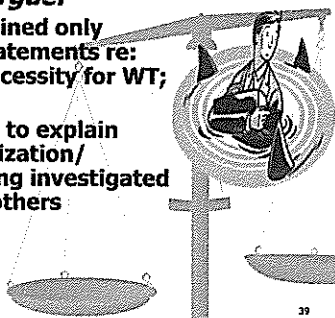
EXHAUSTION EXPLAINED

- After-the-fact suggestions by defense counsel as to other methods that might have been tried have been rejected by several reviewing courts. That the officers who sought the wiretap had some success with normal procedures after the tap was obtained does not invalidate the issuing Judge's findings.



BOILER PLATE LANGUAGE

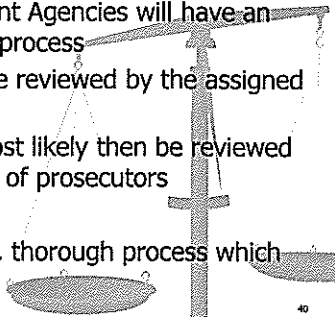
- **Defense Will Argue:**
 - Affidavit contained only generalized statements re: exhaustion/necessity for WT; or
 - Affidavit failed to explain how the organization/conspiracy being investigated differed from others



39

Affidavit Review Process

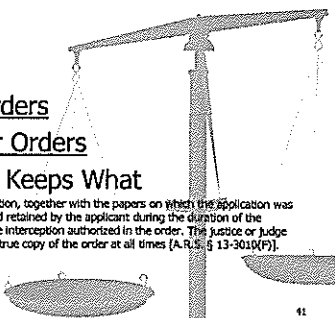
- Law Enforcement Agencies will have an internal review process
- Affidavits will be reviewed by the assigned prosecutor
- Affidavit will most likely then be reviewed by a committee of prosecutors
- Judicial Review
- Labor-intensive, thorough process which takes time



40

Corresponding Paperwork

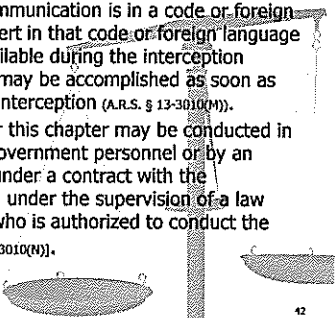
- Authorization
- Application
- Affidavit
- Findings and Orders
- Service Provider Orders
- Logistics – Who Keeps What
 - Any ex parte order for interception, together with the papers on which the application was based, shall be delivered to and retained by the applicant during the duration of the interception as authority for the interception authorized in the order. The justice or judge issuing the order shall retain a true copy of the order at all times [A.R.S. § 13-3010(F)].



41

Monitoring

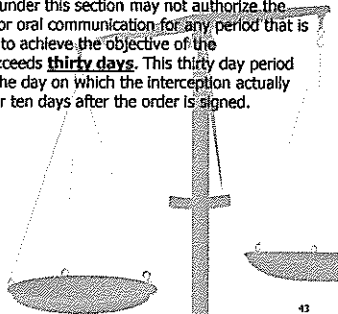
- If the intercepted communication is in a code or foreign language and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception [A.R.S. § 13-3010(M)].
- An interception under this chapter may be conducted in whole or in part by government personnel or by an individual operating under a contract with the government or acting under the supervision of a law enforcement officer who is authorized to conduct the interception [A.R.S. § 13-3010(N)].



42

Length of Interception

- An order that is entered under this section may not authorize the interception of any wire or oral communication for any period that is longer than is necessary to achieve the objective of the authorization and that exceeds **thirty days**. This thirty day period begins on the earlier of the day on which the interception actually begins under the order or ten days after the order is signed.

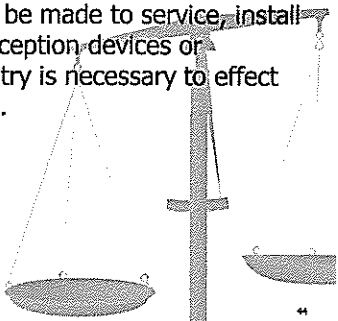


43

Listening Devices

A.R.S. § 13-3010(D)(7)

- That entry may be made to service, install or remove interception devices or equipment if entry is necessary to effect the interception.



44

A.R.S. § 13-3010(L)

- Any order authorizing the interception of wire communications pursuant to this chapter is also deemed to authorize the interception of any electronic communication that may be made over the same equipment or by the same facility.

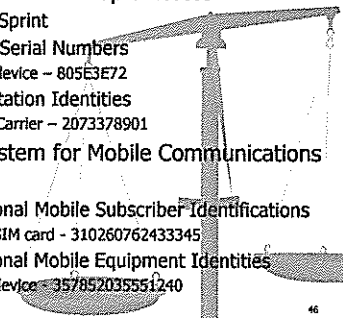
- Text Messages
- Fax
- BB PIN-to-PIN
- Emails?
- Apps?



45

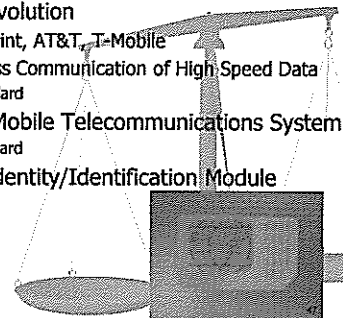
Terminology

- **CDMA** – Code Division Multiple Access
 - Verizon, Cricket, Sprint
 - **ESN** - Electronic Serial Numbers
 - Assigned to the device – 805E3E72
 - **MSID** - Mobile Station Identities
 - Assigned by the Carrier – 2073378901
- **GSM** – Global System for Mobile Communications
 - AT&T, T-Mobile
 - **IMSI** - International Mobile Subscriber Identifications
 - Assigned to the SIM card - 310260762433345
 - **IMEI** - International Mobile Equipment Identities
 - Assigned to the device - 357852035551240




Terminology

- **LTE** – Long Term Evolution
 - Verizon, Cricket, Sprint, AT&T, T-Mobile
 - Standard for Wireless Communication of High Speed Data
 - Based on GSM Standard
- **UMTS** – Universal Mobile Telecommunications System
 - Based on GSM Standard
- **SIM** – Subscriber Identity/Identification Module



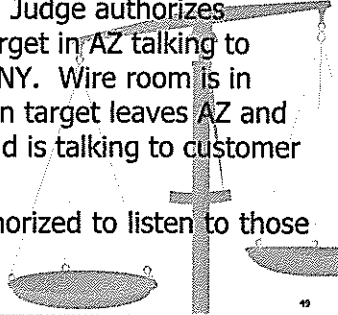
“ROVING” WIRETAPS

- Roving interceptions are permissible only when the applicant demonstrates that a particular identified individual/individuals can be expected to use numerous telephones or locations to discuss their crimes as a means of evading surveillance.
- The roving wiretap provision requires the application to show and the judge to find that the targeted individual switches telephones for the purpose of thwarting surveillance.



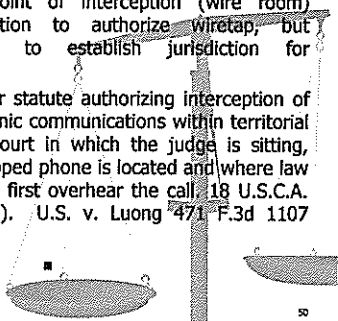
Jurisdiction to Authorize Wiretap

- Hypothetical: Judge authorizes wiretap for target in AZ talking to customers in NY. Wire room is in Phoenix. Then target leaves AZ and goes to CA and is talking to customer in NY.
- Are we authorized to listen to those calls?



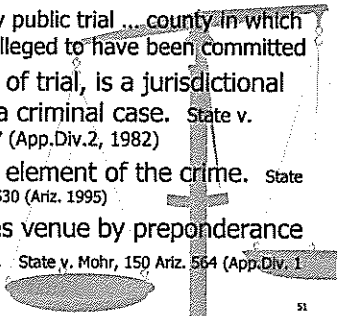
Jurisdiction to Authorize Wiretap

- Location of the point of interception (wire room) determines jurisdiction to authorize wiretap, but beware—still have to establish jurisdiction for prosecution
- "Interception," under statute authorizing interception of wire, oral, or electronic communications within territorial jurisdiction of the court in which the judge is sitting, occurs where the tapped phone is located and where law enforcement officers first overhear the call. 18 U.S.C.A. §§ 2510(4), 2518(3). U.S. v. Luong, 471 F.3d 1107 (C.A.9 (Cal.), 2006).



JURISDICTION

- Article 2, § 24, Arizona Constitution
 - "right to speedy public trial ... county in which the offense is alleged to have been committed"
- Venue, or place of trial, is a jurisdictional requirement in a criminal case. State v. Agnew, 132 Ariz. 567 (App.Div.2, 1982)
- Venue is *not* an element of the crime. State v. Willoughby, 181 Ariz. 530 (Ariz. 1995)
- The State proves venue by preponderance of the evidence. State v. Mohr, 150 Ariz. 564 (App.Div. 1 1986)



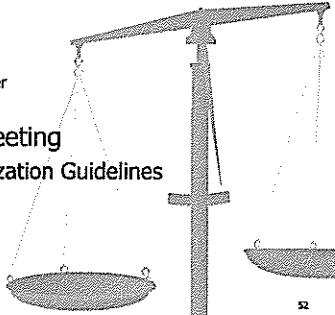
So, You Are Ready to Do a Wire

■ Manpower

- Affiant/s
- Line Investigators
- Search Warrant Writer
- Surveillance Officers

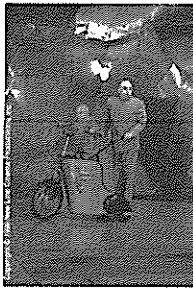
■ Minimization Meeting

- General Minimization Guidelines
- Privileges
 - Attorney – Client
 - Husband – Wife
 - Clergy – Parishioner
 - Doctor – Patient

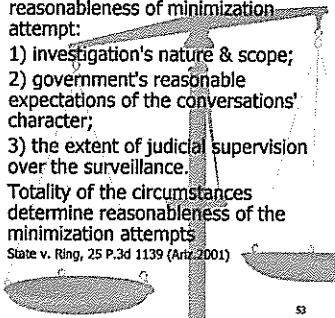


52

Minimization



- Three factors determine objective reasonableness of minimization attempt:
 - 1) investigation's nature & scope;
 - 2) government's reasonable expectations of the conversations' character;
 - 3) the extent of judicial supervision over the surveillance.
- Totality of the circumstances determine reasonableness of the minimization attempts
- State v. Ring, 25 P.3d 1139 (Ariz.2001)

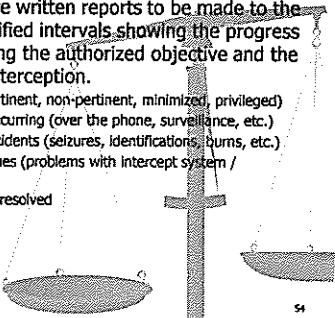


53

Judge's Reports

(A.R.S. § 13-3010(K))

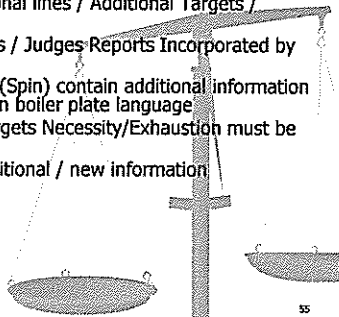
- The order may require written reports to be made to the issuing judge at specified intervals showing the progress made toward achieving the authorized objective and the need for continued interception.
 - Report the statistics (pertinent, non-pertinent, minimized, privileged)
 - Tell the judge what is occurring (over the phone, surveillance, etc.)
 - Report any exception incidents (seizures, identifications, burns, etc.)
 - Report any technical issues (problems with intercept system / malfunctions)
 - Report how issues were resolved



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Amended Affidavits / Spins

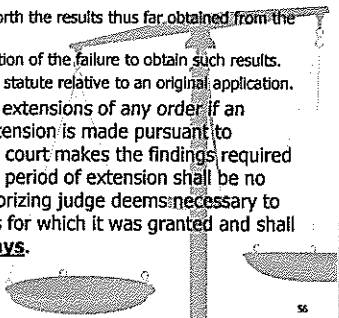
- Can be for additional lines / Additional Targets / Additional Crimes
- Previous Affidavits / Judges Reports Incorporated by Reference
- Ensure Amended (Spin) contain additional information and do not contain boiler plate language
- For Additional Targets Necessity/Exhaustion must be shown
- Include other additional / new information



35

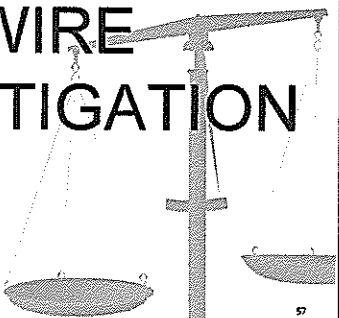
Extensions

- If the application is for the extension of an order it must contain:
 - a statement setting forth the results thus far obtained from the interception, or
 - a reasonable explanation of the failure to obtain such results.
 - Must comply with the statute relative to an original application.
- The court *may* grant extensions of any order if an application for an extension is made pursuant to subsection A and the court makes the findings required by subsection C. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and shall not exceed **thirty days**.



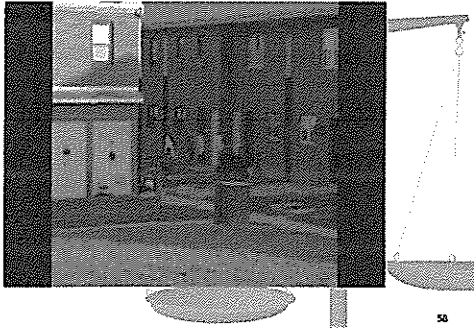
36

WIRE INVESTIGATION



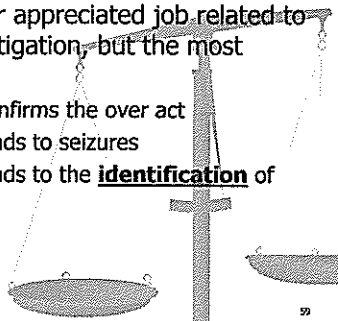
37

Attention to detail – everything matters



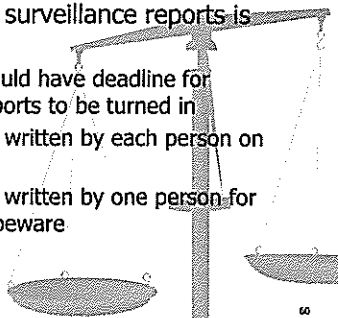
Surveillance

- The most under appreciated job related to a wiretap investigation, but the most important
 - Surveillance confirms the over act
 - Surveillance leads to seizures
 - Surveillance leads to the identification of co-conspirators

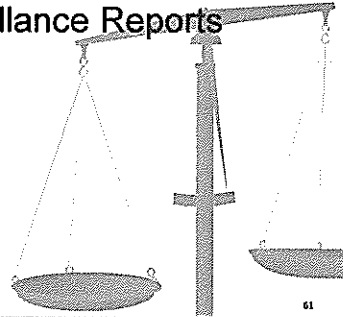


Surveillance Reports

- Organization of surveillance reports is critical
 - Case agent should have deadline for surveillance reports to be turned in
 - Reports can be written by each person on surveillance
 - Reports can be written by one person for everyone, but beware



Examples of Detailed Surveillance Reports



[illegible][illegible]

| FEDERAL BUREAU OF INVESTIGATION - UNITED STATES DEPARTMENT OF JUSTICE | | | | | | | | | |
|---|-----|------|-----|----------|-----|---------|-----|---------|-----|
| SURVEILLANCE REPORT | | | | | | | | | |
| Date | | Time | | Location | | Subject | | Officer | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 |
| 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 |
| 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58 | 59 | 60 |
| 61 | 62 | 63 | 64 | 65 | 66 | 67 | 68 | 69 | 70 |
| 71 | 72 | 73 | 74 | 75 | 76 | 77 | 78 | 79 | 80 |
| 81 | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 |
| 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 100 |
| 101 | 102 | 103 | 104 | 105 | 106 | 107 | 108 | 109 | 110 |
| 111 | 112 | 113 | 114 | 115 | 116 | 117 | 118 | 119 | 120 |
| 121 | 122 | 123 | 124 | 125 | 126 | 127 | 128 | 129 | 130 |
| 131 | 132 | 133 | 134 | 135 | 136 | 137 | 138 | 139 | 140 |
| 141 | 142 | 143 | 144 | 145 | 146 | 147 | 148 | 149 | 150 |
| 151 | 152 | 153 | 154 | 155 | 156 | 157 | 158 | 159 | 160 |
| 161 | 162 | 163 | 164 | 165 | 166 | 167 | 168 | 169 | 170 |
| 171 | 172 | 173 | 174 | 175 | 176 | 177 | 178 | 179 | 180 |
| 181 | 182 | 183 | 184 | 185 | 186 | 187 | 188 | 189 | 190 |
| 191 | 192 | 193 | 194 | 195 | 196 | 197 | 198 | 199 | 200 |
| 201 | 202 | 203 | 204 | 205 | 206 | 207 | 208 | 209 | 210 |
| 211 | 212 | 213 | 214 | 215 | 216 | 217 | 218 | 219 | 220 |
| 221 | 222 | 223 | 224 | 225 | 226 | 227 | 228 | 229 | 230 |
| 231 | 232 | 233 | 234 | 235 | 236 | 237 | 238 | 239 | 240 |
| 241 | 242 | 243 | 244 | 245 | 246 | 247 | 248 | 249 | 250 |
| 251 | 252 | 253 | 254 | 255 | 256 | 257 | 258 | 259 | 260 |
| 261 | 262 | 263 | 264 | 265 | 266 | 267 | 268 | 269 | 270 |
| 271 | 272 | 273 | 274 | 275 | 276 | 277 | 278 | 279 | 280 |
| 281 | 282 | 283 | 284 | 285 | 286 | 287 | 288 | 289 | 290 |
| 291 | 292 | 293 | 294 | 295 | 296 | 297 | 298 | 299 | 300 |
| 301 | 302 | 303 | 304 | 305 | 306 | 307 | 308 | 309 | 310 |
| 311 | 312 | 313 | 314 | 315 | 316 | 317 | 318 | 319 | 320 |
| 321 | 322 | 323 | 324 | 325 | 326 | 327 | 328 | 329 | 330 |
| 331 | 332 | 333 | 334 | 335 | 336 | 337 | 338 | 339 | 340 |
| 341 | 342 | 343 | 344 | 345 | 346 | 347 | 348 | 349 | 350 |
| 351 | 352 | 353 | 354 | 355 | 356 | 357 | 358 | 359 | 360 |
| 361 | 362 | 363 | 364 | 365 | 366 | 367 | 368 | 369 | 370 |
| 371 | 372 | 373 | 374 | 375 | 376 | 377 | 378 | 379 | 380 |
| 381 | 382 | 383 | 384 | 385 | 386 | 387 | 388 | 389 | 390 |
| 391 | 392 | 393 | 394 | 395 | 396 | 397 | 398 | 399 | 400 |
| 401 | 402 | 403 | 404 | 405 | 406 | 407 | 408 | 409 | 410 |
| 411 | 412 | 413 | 414 | 415 | 416 | 417 | 41 | | |

NARRATIVE

On 051111 at approximately 1315 hours, I was alerted to the parking lot between the Burger King and Auto Parts store close to L.A. Forum in Torrance. I responded to 5 E. Southern Avenue and parked an observation / intelligence position and observed David Mosley drive into the parking lot from Southern Avenue, at 1322 hours. Mosley traveled southbound into the parking lot just north of the Fast-A-Center (FAC) and parked facing eastbound, centered in the parking lot. Today's date was to be between Mosley and "Taco".

Mosley sat within the Intrepid in the position for approximately 3 minutes, surveying the area and checking on his cell phone. At 1328 hours, Mosley drove the Intrepid to the parking lot between Burger King and the Off-Road Auto Parts store and parked facing eastbound, centered in the lot. At 1332 hours, Mosley exited the Intrepid and walked into the Off-Road Auto Parts store and returned inside his approximately 1331 hours.

Mosley walked directly to and from the Off-Road store and upon exit, he carried an unknown item that he appeared to purchase from within the auto store. As he walked back to his Intrepid, Mosley again, surveyed the area and looked at close by vehicles which there were three.

While within a mere 3-5 feet of his Intrepid, the Jeep Liberty driven by "Taco" drove into the parking lot from the LAF Avenue entrance. This entrance is on the southeast corner and is the furthest south. The Jeep drove directly to the parking lot between the Off-Road Auto Parts store and the Burger King and stopped in the stall to the left of the Intrepid.

Just as the Jeep could come to a complete stop, Mosley was already bending over at the speed driver door to the Intrepid and retrieving a plastic bag (grocery bag). The bag appeared to be doubled and the Jeep remained stationary as Mosley closed the door to the Intrepid and opened the door to the Jeep. Mosley carried the plastic bag with his left hand and opened the door with his right. Mosley placed the plastic bag in the Jeep's right seat area and pulled away from this Jeep carrying a Paradise Bakery bag. This Paradise Bakery bag was seen by Officer's Berle #5513 and one on 052011 at 7774 W. Whiston Avenue. At the time of our initial viewing of this bag, it was handed to "Taco" by the driver of a blue Chevrolet Impala possibly driven by its owner Hilda Torres.

Mosley was able to close the door of the Jeep and open the door of the Intrepid without taking a step, and he did so with his right hand. Mosley placed the Paradise Bakery bag into the Intrepid and appeared to keep it in the third driver compartment. This action took less than 15 seconds, and "Taco" never took his foot off of the brake pedal as the brake lights remained activated the entire time. After Mosley closed the door to the Jeep, the Jeep began to pull away and then turned southbound through the parking lot and left the parking lot in the same direction it arrived.

Mosley then drove away northbound in the parking lot in the same direction I sat. He entered from, Mosley turned left (westbound) onto Southern Avenue and traveled away from the area.

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NARRATIVE

On 052011 at approximately 1920 hours, I was alerted to the Shell gas station located at 3444 S. 40th Street. This location was said to be the meeting place for Mosley and an unknown black male who might be driving a blue Impala. Mosley was said to be in his Delivery van.

I was in place at 1925 hours, when I observed a blue 2010 Chevrolet Impala drive into the parking lot of the Shell gas station at approximately 1941 hours. The Impala parked against the west portion of the parking lot, bypassing the convenience store, the gas pumps and the parking stalls close to the convenience store. The Impala parked facing westbound and left the stalls to his right again. At approximately 1942 hours, Mosley arrived to the same Shell gas station and parked to the right of the Impala, also facing in a westerly direction.

As Mosley arrived, Gentry exited his Impala and stood in the parking lot close to the Impala's driver side. Mosley parked and Gentry approached the driver door of the van and a 2 + 1/2 minutes (approximate) conversation took place. Gentry then walked around the front of the van and climbed into the passenger seat of the van.

After approximately 5 minutes and 37 seconds, Gentry exited the passenger seat and began to walk back to his Impala. Mosley had already placed the van into reverse while waiting for Gentry to exit. Gentry walked around the front of the van while Mosley backed out of the stall and angled his vehicle for an exit onto 40th Street through the southeast exit point and left the area via 40th Street southbound. Gentry walked around behind his Impala and climbed into the driver seat while reaching into his left shorts pocket. Gentry started the Impala quickly and he too utilized the southeast exit point to pull onto 40th Street and head northbound, quickly.

Volunteers subsequently followed the vehicle which traveled at high speeds before the Impala was stopped by a marked police unit.

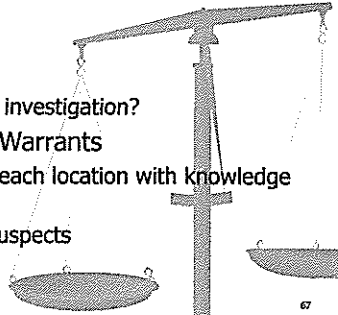
65

Triangle of Success

66

Strategizing

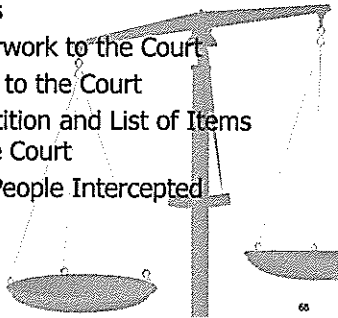
- Seizures
 - How many
 - From whom
 - What affect on investigation?
- Arrests/Search Warrants
 - One person to each location with knowledge of the case
 - Interviews of suspects



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End of Interception Procedures A.R.S. §§13-3010 (G) & (H)

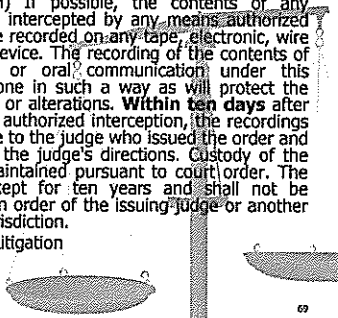
- Sealing of Disks
- Return of Paperwork to the Court
- Return of Disks to the Court
- Termination Petition and List of Items Returned to the Court
- Notification of People Intercepted



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Sealing of Disks

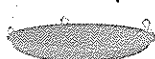
- A.R.S. § 13-3010 (H) If possible, the contents of any communication that is intercepted by any means authorized by this section shall be recorded on any tape, electronic, wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such a way as will protect the recording from editing or alterations. **Within ten days** after the termination of the authorized interception, the recordings shall be made available to the judge who issued the order and shall be sealed under the judge's directions. Custody of the recordings shall be maintained pursuant to court order. The recordings shall be kept for ten years and shall not be destroyed except on an order of the issuing judge or another judge of competent jurisdiction.
- BUT—Beware Recent Litigation



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Sealing of Paperwork

- A.R.S. § 13-3010 (G) Within ten days after the termination of the authorized interception, applications made and orders granted under this section shall be returned to and sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only on a showing of good cause before a judge of competent jurisdiction or as otherwise provided.



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Notification

A.R.S. § 13-3010(I)

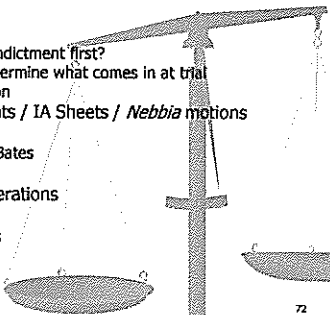
- Within **ninety days** after an application under subsection A is denied, or the period of an order or any extension expires, the issuing or denying judge shall serve the persons named in the order or application and any other parties to the intercepted communications as the judge may determine the interests of justice require with an inventory, including notice of all of the following:
 - The fact of the entry of the order or the application.
 - The date of the entry and the period of authorized interception, or the denial of the application.
 - The fact that during the period of authorized interception wire, electronic or oral communications were or were not intercepted. On motion, the judge may make available to the person or the person's attorney for inspection such portions of the intercepted communications, applications and order as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the judge, the serving of the notice required by this subsection may be postponed.



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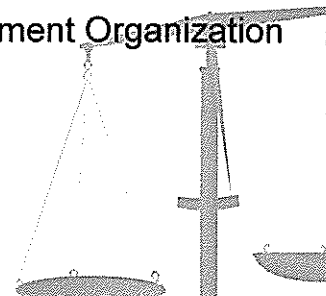
Prosecution of the Wire — Roadmap

- Charging Notebooks
- The Indictment
 - When? Takedown or indictment first?
 - Charges and dates determine what comes in at trial
 - Grand Jury presentation
- Form IVs / PC statements / IA Sheets / *Nebbia* motions
- Discovery
 - Organization: Index, Bates
- Show & Tells
- Plea Agreement Considerations
- Defense Interviews
- Settlement Conferences
- Litigation



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Pre-Indictment Organization

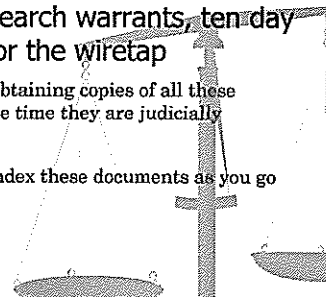


73

CHARGING NOTEBOOKS

Make sure you have all affidavits, applications, search warrants, ten day reports, etc. for the wiretap

- You should be obtaining copies of all these documents at the time they are judicially authorized
- Organize and index these documents as you go along

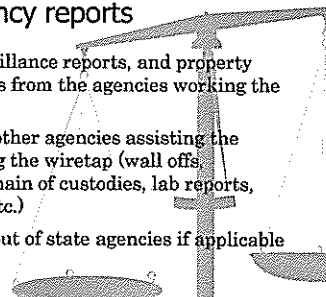


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CHARGING NOTEBOOKS

Obtain all agency reports

- Reports, surveillance reports, and property inventory forms from the agencies working the wiretap
- Reports from other agencies assisting the agency working the wiretap (wall offs, surveillance, chain of custodies, lab reports, photographs, etc.)
- Reports from out of state agencies if applicable

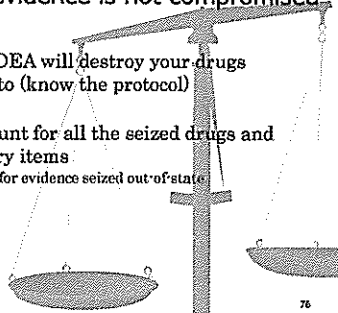


75

SHOW ME THE DISCOVERY!

Make sure your evidence is not compromised

- Border Patrol/DEA will destroy your drugs unless told not to (know the protocol)
- Be able to account for all the seized drugs and other evidentiary items
 - Especially true for evidence seized out-of-state

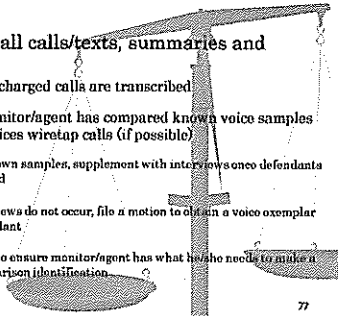


76

SHOW ME THE DISCOVERY!

Obtain the DVDs/Blu-rays for all wiretap lines

- Complete with all calls/texts, summaries and transcripts
 - Make sure all charged calls are transcribed
 - Make sure monitor/agent has compared known voice samples to "unknown" voices wiretap calls (if possible)
 - ✓ If no known samples, supplement with interviews once defendants are arrested
 - ✓ If interviews do not occur, file a motion to obtain a voice exemplar from defendant
 - ✓ Critical to ensure monitor/agent has what he/she needs to make a voice comparison identification

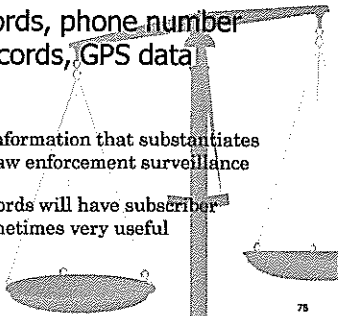


77

SHOW ME THE DISCOVERY!

Obtain toll records, phone number subscription records, GPS data download, etc.

- Any records or information that substantiates your wiretap or law enforcement surveillance
- Subscription records will have subscriber information—sometimes very useful

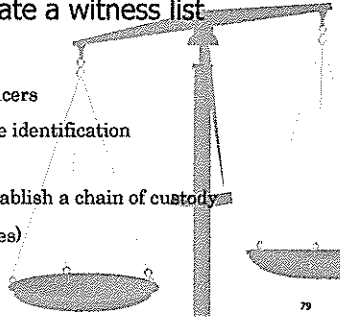


78

SHOW ME THE DISCOVERY!

Attempt to create a witness list

- Affiants
- Surveillance officers
- Witness for voice identification
- Criminalist
- Officers who establish a chain of custody
- Expert witness(es)

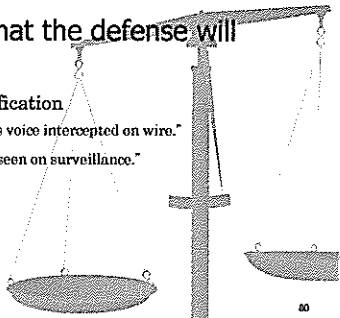


79

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Think about what the defense will likely be

- Mistaken identification
 - "Not my client's voice intercepted on wire."
 - "Not my client seen on surveillance."

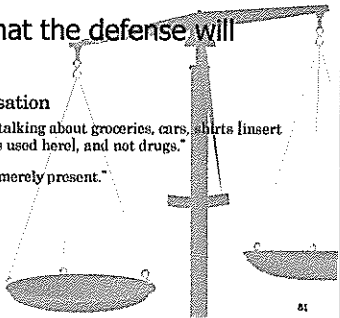


80

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Think about what the defense will likely be

- Innocent conversation
 - "My client was talking about groceries, cars, shirts [insert whatever code was used here], and not drugs."
 - "My client was merely present."

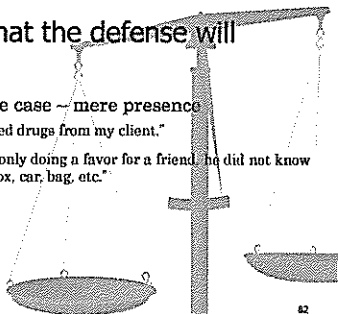


81

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Think about what the defense will likely be

- Cannot prove the case ~ mere presence
 - "You never seized drugs from my client."
 - "My client was only doing a favor for a friend, he did not know what was in the box, car, bag, etc."

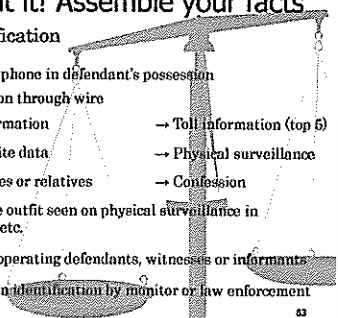


62

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Be able to rebut it! Assemble your facts

- Mistaken identification
 - Intercepted cell phone in defendant's possession
 - Self-identification through wire
 - Subscriber information
 - Historical cell site data
 - Known associates or relatives
 - If possible, seize outfit seen on physical surveillance in defendant's home, etc.
 - Testimony of cooperating defendants, witnesses or informants
 - Voice comparison identification by monitor or law enforcement
- Toll information (top 5)
- Physical surveillance
- Confession

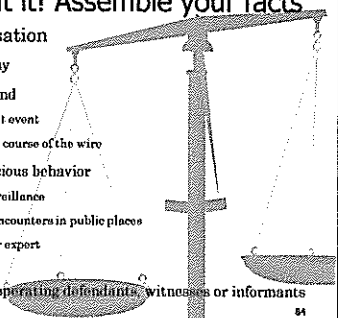


63

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Be able to rebut it! Assemble your facts

- Innocent conversation
 - Expert testimony
 - Seized contraband
 - ✓ Seized in that event
 - ✓ Seized in the course of the wire
 - Observed suspicious behavior
 - ✓ Counter surveillance
 - ✓ Short/brief encounters in public places
 - ✓ Consult your expert
 - Confession
 - Testimony of cooperating defendants, witnesses or informants



64

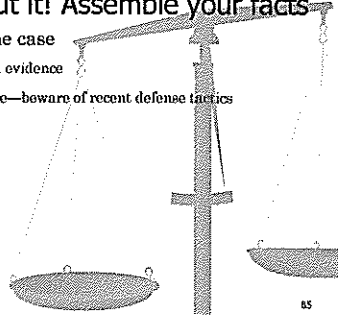
TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Be able to rebut it! Assemble your facts

· Cannot prove the case

→ Circumstantial evidence

→ Expert evidence—beware of recent defense tactics



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TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Be able to rebut it! Assemble your facts

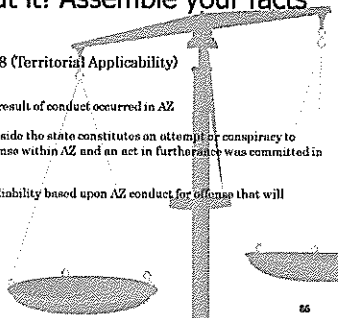
· Jurisdiction

→ A.R.S. § 13-108 (Territorial Applicability)

✓ Conduct or result of conduct occurred in AZ

✓ Conduct outside the state constitutes an attempt or conspiracy to commit an offense within AZ and an act in furtherance was committed in AZ

✓ Accomplice liability based upon AZ conduct for offense that will occur out of AZ



86

TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

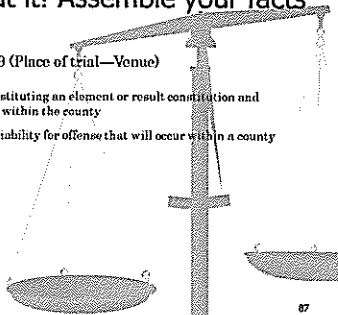
Be able to rebut it! Assemble your facts

· Jurisdiction

→ A.R.S. § 13-109 (Place of trial—Venue)

✓ Conduct constituting an element or result constitution and element occurs within the county

✓ Accomplice liability for offense that will occur within a county



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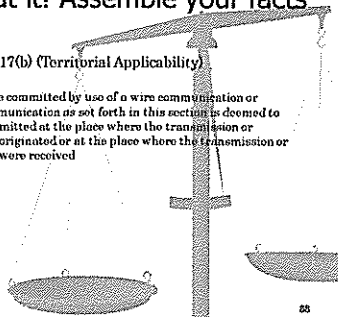
TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...

Be able to rebut it! Assemble your facts

·Jurisdiction

→ A.R.S. § 13-3417(b) (Territorial Applicability)

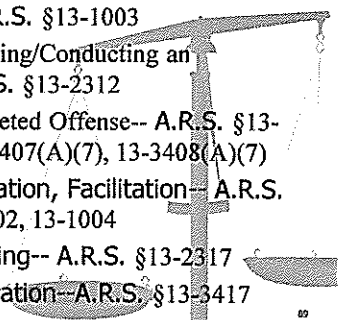
✓ "Any offense committed by use of a wire communication or electronic communication as set forth in this section is deemed to have been committed at the place where the transmission or transmissions originated or at the place where the transmission or transmissions were received"



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Typical charges to consider

- Conspiracy--A.R.S. §13-1003
- Illegally Controlling/Conducting an Enterprise--A.R.S. §13-2312
- Offer or a Completed Offense-- A.R.S. §13-3405(A)(4), 13-3407(A)(7), 13-3408(A)(7)
- Attempt, Solicitation, Facilitation-- A.R.S. §13-1001, 13-1002, 13-1004
- Money Laundering-- A.R.S. §13-2317
- Wire Communication--A.R.S. §13-3417



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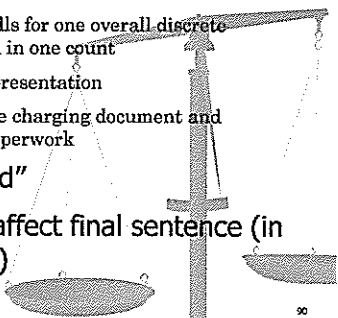
LESS IS MORE!

Charge by event

- Series of wire calls for one overall discrete objective charged in one count
- Easier for trial presentation
- Easier to prepare charging document and accompanying paperwork

Easier to "Brand"

Unlikely it will affect final sentence (in most instances)



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THE BOTTOM LINE

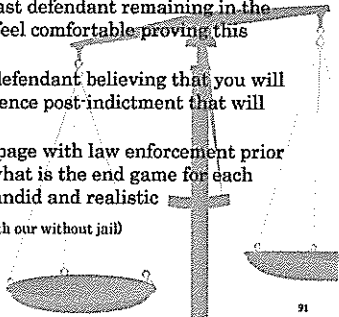
Consider each defendant individually

· If this was the last defendant remaining in the case, would you feel comfortable proving this case at trial?

· Do not indict a defendant believing that you will obtain more evidence post-indictment that will shore up charges

· Be on the same page with law enforcement prior to indictment—what is the end game for each defendant—be candid and realistic

- Probation (with or without jail)
- Prison
- Plea/Trial
- Cooperation



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SEE YOU AROUND TAKEDOWN

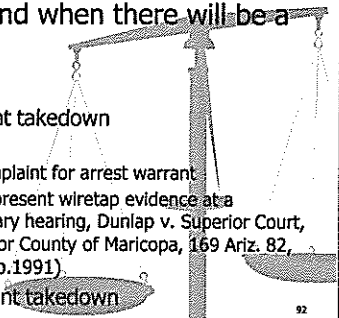
■ Determine if and when there will be a takedown

■ Options

■ Pre-indictment takedown

- PC arrest
- Holding complaint for arrest warrant
 - Cannot present wiretap evidence at a preliminary hearing, *Dunlap v. Superior Court, In and For County of Maricopa*, 169 Ariz. 82, (Ariz.App.1991)

■ Post-indictment takedown



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SEE YOU AROUND TAKEDOWN

Pre-indictment takedown

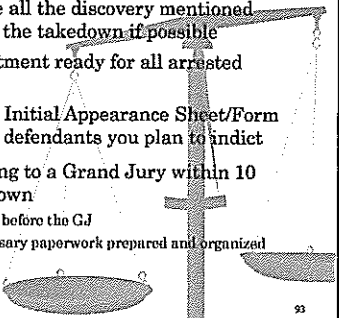
· Be sure you have all the discovery mentioned previously before the takedown if possible

· Have draft indictment ready for all arrested defendants

· Have a prepared Initial Appearance Sheet/Form IV for each of the defendants you plan to indict

· Plan on presenting to a Grand Jury within 10 days of the takedown

- Reserve a spot before the GJ
- Have all necessary paperwork prepared and organized beforehand

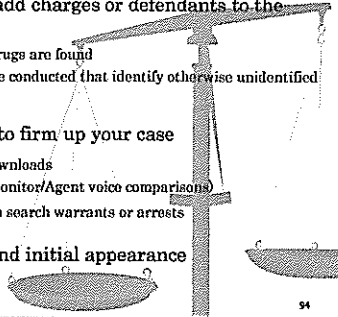


93

SEE YOU AROUND TAKEDOWN

Pre-indictment takedown

- Be prepared to add charges or defendants to the indictment
 - If money or drugs are found
 - Interviews are conducted that identify otherwise unidentified co-conspirators
- An opportunity to firm up your case
 - Cell phone downloads
 - Interviews (Monitor/Agent voice comparisons)
 - Evidence from search warrants or arrests
- Be ready to attend initial appearance

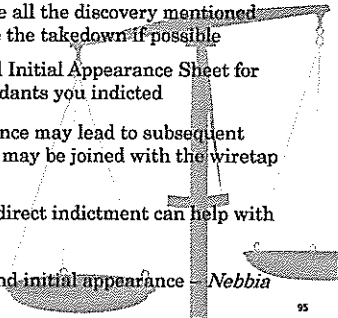


94

SEE YOU AROUND TAKEDOWN

Post indictment takedown

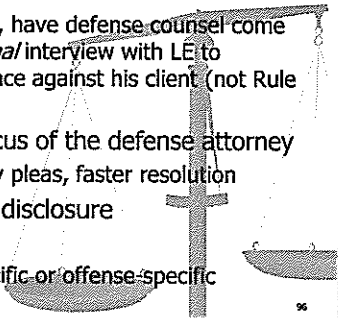
- Be sure you have all the discovery mentioned previously before the takedown if possible
- Have a prepared Initial Appearance Sheet for each of the defendants you indicted
- Additional evidence may lead to subsequent indictments that may be joined with the wiretap case
- A warrant for a direct indictment can help with higher bonds
- Be ready to attend initial appearance - *Nebbia* motions



95

SHOW YOUR HAND

- "Show and Tell"
 - after disclosure, have defense counsel come in for an *informal* interview with LE to highlight evidence against his client (not Rule 15 interview)
- Narrows the focus of the defense attorney
 - Helps with early pleas, faster resolution
- Organization of disclosure
 - Chronological
 - Defendant-specific or offense-specific



96

THE COOPERATING DEFENDANT/WITNESS

→ Things to consider:

✓ Law enforcement initiated free talks:

—Why does law enforcement want to talk to the defendant?

» Was there a post-arrest interview?

° Did Defendant give it all up?

° Did Defendant lie or minimize?

—What information do they want to obtain?

» Why do they think this person will talk honestly?

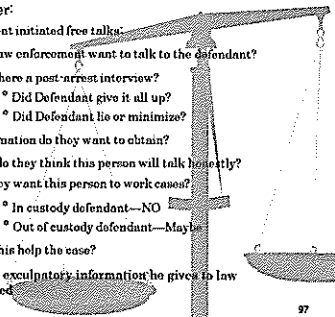
» Do they want this person to work cases?

° In custody defendant—NO

° Out of custody defendant—Maybe

» Will this help the case?

—Warn defendant that any exculpatory information he gives to law enforcement will be disclosed



97

THE COOPERATING DEFENDANT/WITNESS

→ Things to consider:

✓ Defendant Initiated free talks:

—How soon after arrest or arraignment does the request come?

» If early—odds are will be more productive

» If late—odds are will be self-serving

—Is there a proffer?

» How detailed is it?

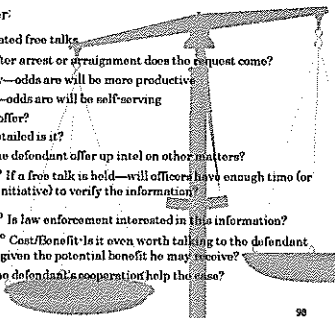
» Does the defendant offer up intel on other matters?

° If a free talk is held—will officers have enough time (or initiative) to verify the information?

° Is law enforcement interested in this information?

° Cost/Benefit—Is it even worth talking to the defendant given the potential benefit he may receive?

» Will the defendant's cooperation help the case?



98

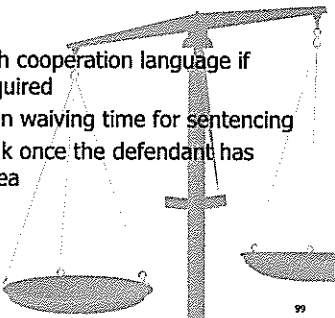
THE COOPERATING DEFENDANT/WITNESS

■ Post-Free Talk:

■ Extend plea with cooperation language if testimony is required

■ Include provision waiving time for sentencing

■ Disclose free talk once the defendant has accepted the plea



99

DEFENSE TACTICS

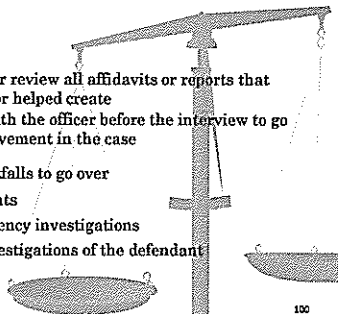
Prepare for the interview like any defense interview

Officer preparation

- Have the officer review all affidavits or reports that she/he authored or helped create
- Call or meet with the officer before the interview to go over his/her involvement in the case

✓ Potential pitfalls to go over

- Informants
- Other agency investigations
- Prior investigations of the defendant



100

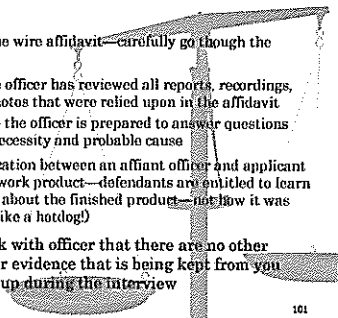
DEFENSE TACTICS

Prepare for the interview like any defense interview

✓ If author of the wire affidavit—carefully go through the affidavit

- Make sure officer has reviewed all reports, recordings, videos or photos that were relied upon in the affidavit
- Make sure the officer is prepared to answer questions regarding necessity and probable cause
- Communication between an affiant officer and applicant attorney is work product—defendants are entitled to learn all they can about the finished product—not how it was made (just like a hotdog!)

✓ Double check with officer that there are no other reports or other evidence that is being kept from you that will come up during the interview



101

DEFENSE TACTICS

Prepare for the interview like any defense interview

Attorney preparation

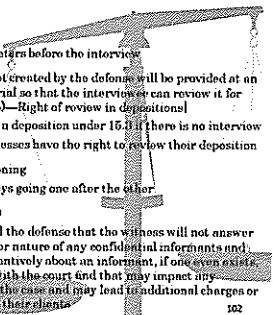
✓ Establish reasonable parameters before the interview

- Agree that any transcript created by the defense will be provided at an agreed upon time before trial so that the interview can review it for accuracy (Ariz. Civ. P. 306)—Right of review in depositions
- »Defense is entitled to a deposition under 15.1 if there is no interview
- »As in civil cases, witnesses have the right to review their deposition

✓ Establish an order of questioning

- Multiple defense attorneys going one after the other
- No duplicative questions

✓ If there are any CI issues tell the defense that the witness will not answer any questions on the existence or nature of any confidential informants and that if they wish to learn substantively about an informant, if one even exists, they will need to file a motion with the court and that may impact any possible non-trial deposition in the case and may lead to additional charges or other net evidence used against their clients



102

DEFENSE TACTICS

Prepare for the interview like any defense interview

Attorney preparation

- ✓ If the witness does not speak English, it is the defendant's responsibility to retain a translator for the purpose of the interview
 - Attempt to have a translator of your own if possible for the interview
 - Have a translator of your own review the interview transcript to determine if the translation is accurate
 - Follow the procedure outlined previously if there is a dispute in the accuracy of translation
 - ✓ One interview per witness
 - Do not have multiple interviews of the same witness
 - Find an agreed upon time and place where all attorneys can be present for the interview
 - Keep a paper trail of all efforts made to coordinate and schedule with each attorney
- Prevents later motions, objections, or duplicate interviews where the defense alleges they did not receive adequate notice

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MOTION FOR SUCCESS

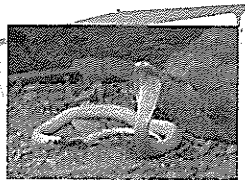
If the defense files a motion to suppress the wire:

- Contact your supervisor!
 - Contact the agents/affiants
 - Review the motion with supervisor and agents/affiants
 - File a motion to extend the time limit to respond
 - Do not re-invent the wheel!
- ✓ Contact your friendly neighborhood wire prosecutors for sample response briefs
 - ✓ If a novel or new issue is argued, PLEASE seek input and a general consensus from your friendly neighborhood wire prosecution on how to respond

104

Franks v. Delaware

- Defense will argue that in the WT affidavit, the affiants:
 - Intentionally or knowingly made a false statement, or
 - Recklessly disregarded the truth; and
 - A hearing is necessary

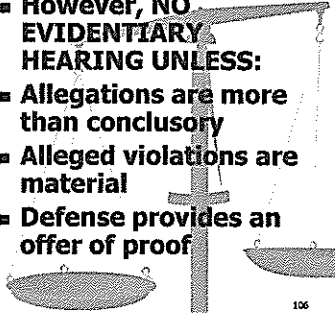


105

Franks v. Delaware



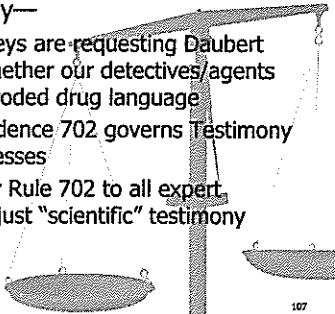
- However, **NO EVIDENTIARY HEARING UNLESS:**
 - Allegations are more than conclusory
 - Alleged violations are material
 - Defense provides an offer of proof



106

Defense Tactics

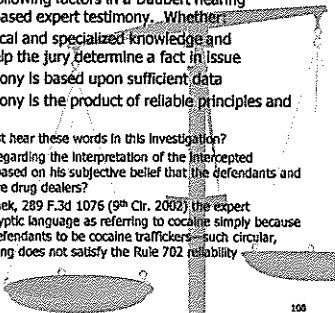
- Expert testimony—
 - Defense attorneys are requesting Daubert hearings re: whether our detectives/agents are experts in coded drug language
 - AZ Rules of Evidence 702 governs Testimony by Expert Witnesses
 - Court can apply Rule 702 to all expert testimony, not just “scientific” testimony



107

Defense Tactics

- Expert Testimony
 - Court will look to the following factors in a Daubert hearing regarding experience based expert testimony. Whether:
 - The expert's technical and specialized knowledge and examination will help the jury determine a fact in issue
 - The expert's testimony is based upon sufficient data
 - The expert's testimony is the product of reliable principles and methods—i.e.
 - Did the expert first hear these words in this investigation?
 - Was his opinion regarding the interpretation of the intercepted communications based on his subjective belief that the defendants and co-conspirators are drug dealers?
 - In U.S. v. Hermanek, 289 F.3d 1075 (9th Cir. 2002) the expert interpreted the cryptic language as referring to cocaine simply because he believed the defendants to be cocaine traffickers—such circular, subjective reasoning does not satisfy the Rule 702 reliability requirement.

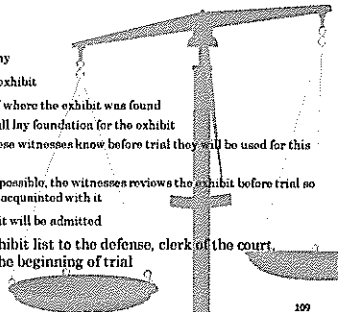


108

GOING ON A BINDER

Prepare an exhibit list

- Should include
 - ✓ Trial exhibit #
 - ✓ LEA Exhibit # if any
 - ✓ Description of the exhibit
 - ✓ Location (if any) of where the exhibit was found
 - ✓ Witness(es) who will lay foundation for the exhibit
 - Make sure these witnesses know before trial they will be used for this purpose
 - Make sure, if possible, the witnesses review the exhibit before trial so that they are reacquainted with it
 - ✓ Whether the exhibit will be admitted
- Provide a redacted exhibit list to the defense, clerk of the court, and judge well before the beginning of trial

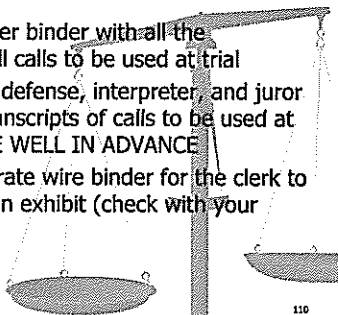


109

ASSEMBLING THE BINDER

■ Wire calls

- Prepare a master binder with all the transcripts of all calls to be used at trial
- Prepare judge, defense, interpreter, and juror binders with transcripts of calls to be used at trial — PREPARE WELL IN ADVANCE
- Prepare a separate wire binder for the clerk to be marked as an exhibit (check with your clerk)



110

ASSEMBLING THE BINDER

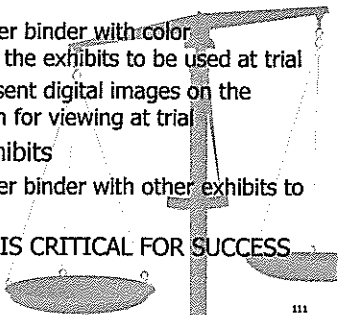
■ Photographs

- Prepare a master binder with color photographs of the exhibits to be used at trial
- If possible, present digital images on the projector screen for viewing at trial

■ Other paper exhibits

- Prepare a master binder with other exhibits to be used at trial

■ ORGANIZATION IS CRITICAL FOR SUCCESS

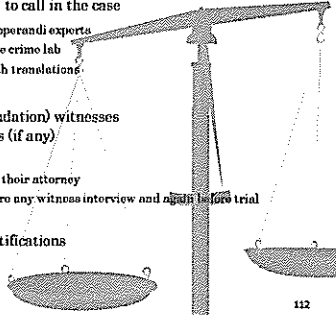


111

GOING ON A BINDER

The final witness list (Romero List)

- All experts you intend to call in the case
 - ✓ "For sale" or modus operandi experts
 - ✓ Criminalists from the crime lab
 - ✓ Monitor(s) for English translations
- Records custodian
- Chain of custody (foundation) witnesses
- Civilian fact witnesses (if any)
- Cooperators
 - ✓ Keep in contact with their attorney
 - ✓ Meet with them before any witness interview and again before trial
 - ✓ Handle with care
- Monitor for voice identifications
- Surveillance officers

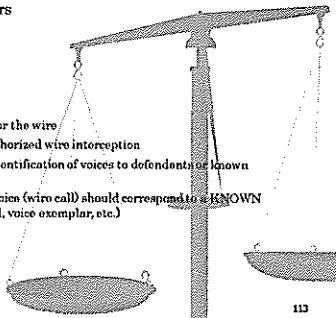


112

GOING ON A BINDER

The final witness list (Romero List)

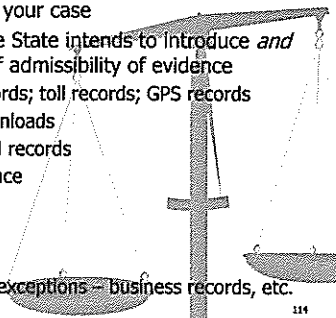
- Search Warrant officers
 - ✓ Photo finder
 - ✓ Searcher
 - ✓ Recorder
- The affiants
 - ✓ Lay the foundation for the wire
 - ✓ Establish a court authorized wire interception
 - ✓ May also establish identification of voices to defendants or known conspirators
 - ✓ Every UNKNOWN voice (wire call) should correspond to a KNOWN voice interview, jail call, voice exemplar, etc.)



113

PRETRIAL LITIGATION – EARLY

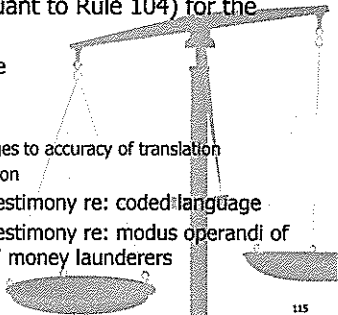
- Judicial determination of admissibility
 - Detailed facts of your case
 - Identify evidence State intends to introduce *and* the legal basis of admissibility of evidence
 - cell phone records; toll records; GPS records
 - cell phone downloads
 - bank / financial records
 - video surveillance
 - wage queries
 - jail calls
 - drug ledgers
 - Know hearsay exceptions – business records, etc.



114

PRETRIAL LITIGATION – EARLY

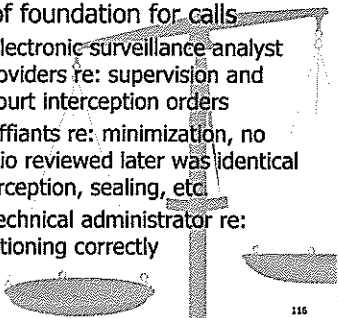
- File pretrial motions to establish a pretrial procedure (pursuant to Rule 104) for the admissibility of:
 - Wiretap evidence
 - audio
 - Transcripts
 - Prevent challenges to accuracy of translation
 - Voice identification
 - Expert witness testimony re: coded language
 - Expert witness testimony re: modus operandi of drug traffickers / money launderers



115

PRETRIAL EVIDENTIARY HEARINGS

- Determination of foundation for calls
 - Affidavit(s) of electronic surveillance analyst from service providers re: supervision and processing of court interception orders
 - Affidavit(s) of affiants re: minimization, no alterations, audio reviewed later was identical to audio at interception, sealing, etc.
 - Affidavit(s) of technical administrator re: equipment functioning correctly

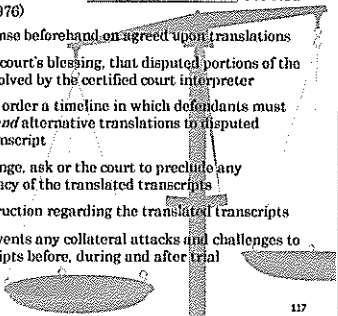


116

TRANSLATION FOUNDATION

Translation

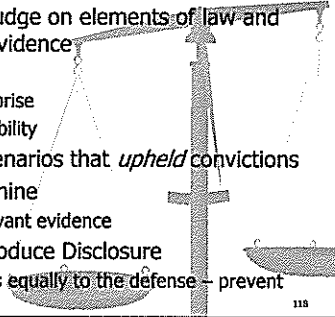
- Abide by the process outlined in United States v. Onori, 535 F.2d 938, 947-49 (5th Cir. 1976)
- Stipulate with defense beforehand on agreed upon translations
- Stipulate, with the court's blessing, that disputed portions of the transcripts will be resolved by the certified court interpreter
- Ask for the court to order a timeline in which defendants must offer their objections *and* alternative translations to disputed translations in the transcript
- If there is no challenge, ask or the court to preclude any challenge to the accuracy of the translated transcripts
- Propose a jury instruction regarding the translated transcripts
- This procedure prevents any collateral attacks and challenges to the translated transcripts before, during and after trial



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Pretrial Litigation – Early!!

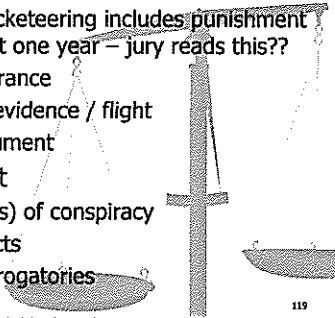
- Memorandum of Law
 - Educate your judge on elements of law and sufficiency of evidence
 - Conspiracy
 - Criminal Enterprise
 - Accomplice Liability
 - Include fact scenarios that *upheld* convictions
 - Motion(s) in Limine
 - Preclude irrelevant evidence
 - Motion(s) to Produce Disclosure
 - Rule 15 applies equally to the defense – prevent ambush



118

Trial Preparation – Early!!

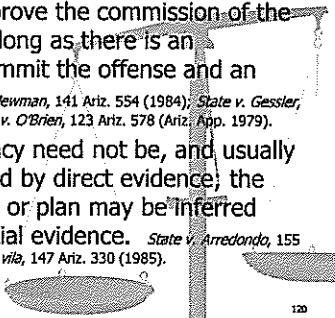
- Jury Instructions
 - Definition of racketeering includes punishment in jail of at least one year – jury reads this??
 - Deliberate ignorance
 - Destruction of evidence / flight
 - Anti-*Willits* argument
- Forms of Verdict
 - Identify object(s) of conspiracy
 - Racketeering acts
 - Threshold interrogatories



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Proving the Conspiracy

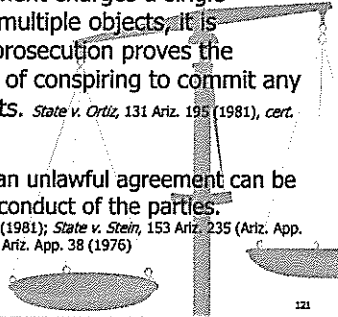
- Conspiracy is an *inchoate* offense. It is unnecessary to prove the commission of the object crime, so long as there is an agreement to commit the offense and an overt act. *State v. Newman*, 141 Ariz. 554 (1984); *State v. Gessler*, 142 Ariz. 379 (1984); *State v. O'Brien*, 123 Ariz. 578 (Ariz. App. 1979).
- Criminal conspiracy need not be, and usually cannot be, proved by direct evidence; the common scheme or plan may be inferred from circumstantial evidence. *State v. Arredondo*, 155 Ariz. 314 (1987); *State v. Avila*, 147 Ariz. 330 (1985).



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Proving the Conspiracy

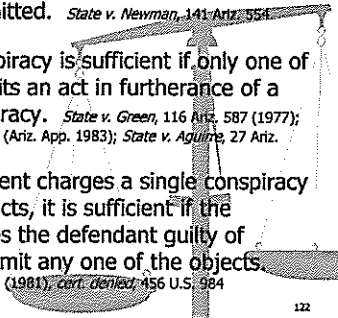
- Where an indictment charges a single conspiracy with multiple objects, it is sufficient if the prosecution proves the defendant guilty of conspiring to commit any one of the objects. *State v. Ortiz*, 131 Ariz. 195 (1981), *cert. denied*, 456 U.S. 984
- The existence of an unlawful agreement can be inferred by overt conduct of the parties. *State v. Hall*, 129 Ariz. 589 (1981); *State v. Stein*, 153 Ariz. 235 (Ariz. App. 1987); *State v. Estrada*, 27 Ariz. App. 38 (1976)



121

Overt Act Requirement

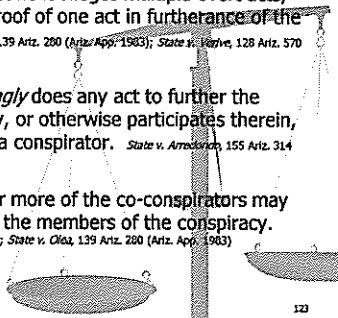
- The crime of conspiracy is complete when an overt act is committed. *State v. Newman*, 141 Ariz. 554 (1984)
- Proof of the conspiracy is sufficient if only one of the parties commits an act in furtherance of a goal of the conspiracy. *State v. Green*, 116 Ariz. 587 (1977); *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983); *State v. Aguirre*, 27 Ariz. App. 637 (1976)
- Where an indictment charges a single conspiracy with multiple objects, it is sufficient if the prosecution proves the defendant guilty of conspiring to commit any one of the objects. *State v. Ortiz*, 131 Ariz. 195 (1981), *cert. denied*, 456 U.S. 984



122

Overt Act Requirement

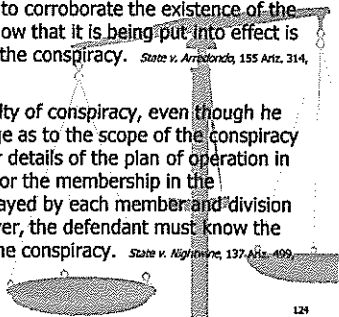
- Even though the indictment alleges multiple overt acts, there need only be proof of one act in furtherance of the conspiracy. *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983); *State v. Harve*, 128 Ariz. 570 (Ariz. App. 1981)
- A person who *knowingly* does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. *State v. Arredondo*, 155 Ariz. 314 (1987)
- Any one act by one or more of the co-conspirators may be attributed to all of the members of the conspiracy. *State v. Dupuy*, 116 Ariz. 151 (1977); *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983)



123

Defeating *Mere Presence* Defense – Overt Act Doesn't Have to be Criminal

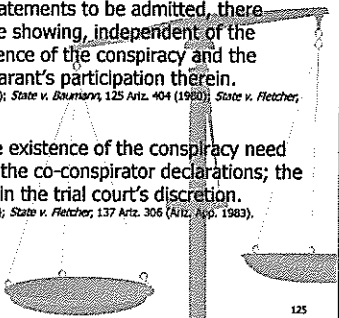
- Any action sufficient to corroborate the existence of the agreement and to show that it is being put into effect is sufficient to support the conspiracy. *State v. Arrabanda*, 155 Ariz. 314, 746 P.2d 484 (1987)
- A person may be guilty of conspiracy, even though he has limited knowledge as to the scope of the conspiracy and no knowledge or details of the plan of operation in furtherance thereof, or the membership in the conspiracy or part played by each member and division of the spoils. However, the defendant must know the general purpose of the conspiracy. *State v. Nightingale*, 137 Ariz. 409, 671 P.2d 1289 (Ariz. App. 1983).



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Prima Facie Showing of Conspiracy

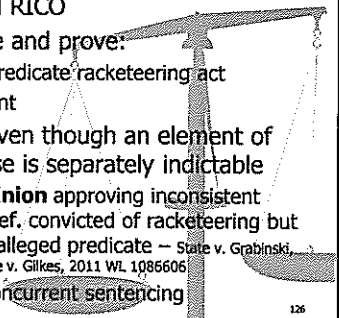
- For co-conspirator statements to be admitted, there must be a prima facie showing, independent of the hearsay, of the existence of the conspiracy and the defendant's and declarant's participation therein. *State v. Martin*, 139 Ariz. 466 (1984); *State v. Bourgeois*, 125 Ariz. 404 (1980); *State v. Fletcher*, 137 Ariz. 306 (Ariz.App. 1983)
- Beware: Proof of the existence of the conspiracy need not precede proof of the co-conspirator declarations; the order of proof is within the trial court's discretion. *State v. Martin*, 139 Ariz. 466 (1984); *State v. Fletcher*, 137 Ariz. 306 (Ariz. App. 1983).



125

Proving the Criminal Enterprise

- Based on Federal RICO
- State must allege and prove:
 - Commission of predicate racketeering act
 - By each defendant
- Not duplicitous even though an element of criminal enterprise is separately indictable
 - **Unreported opinion** approving inconsistent verdicts where Def. convicted of racketeering but acquitted of the alleged predicate – *State v. Grabinski*, 2009 WL 1531020; *State v. Gilkes*, 2011 WL 1086606
 - consecutive v. concurrent sentencing



126

Criminal Enterprise

- Existence/Operation of the enterprise
 - Essential element of criminal enterprise
 - Location of enterprise in Arizona provides jurisdiction when other elements of offense(s) occur out-of-state - *State v. Balnes*, 142 Ariz. 145 (App. 2, 1984)
- A customer can be "associated with" an enterprise under Arizona RICO
 - Direct or indirect participation in the conduct of the enterprise - *State v. Petzoldt*, 172 Ariz. 272 (App. 2, 1992)

**CONSIDER POWERPOINT FOR
OPENING AND CLOSING**

